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No. 06-562

In the
SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,
Petitioner,

v.

ATLANTIC RESEARCH CORPORATION,
Respondent.

On Petition For A Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF OF AMICUS CURIAE AVIALL SERVICES, INC. IN SUPPORT OF PETITIONER UNITED STATES OF AMERICA

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STATEMENT OF INTEREST

Amicus curiae Aviall Services, Inc., is a party in a case on appeal before the United States Court of Appeals for the Fifth Circuit. *Aviall Servs., Inc. v. Cooper Indus., Inc.*, No. 06-10996 (5th Cir. docketed Sept. 18, 2006). One of the issues that Aviall intends to raise in that appeal is the very issue presented by petitioner United States of America in the present case before this Court. The United States and respondent Atlantic Research Corporation have consented to Aviall's submission of this amicus brief, and those parties' written consent is submitted herewith.[1]

SUMMARY OF THE ARGUMENT

Because the question presented in the Petition for Writ of Certiorari is a principal question to be decided by the Fifth Circuit in Aviall's case pending in that court, *Aviall Servs., Inc. v. Cooper Indus., Inc.*, No. 06-10996 (5th Cir. docketed Sept. 18, 2006), Aviall supports the request of the United States that this court grant the petition for writ of certiorari.

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[1] Counsel for Aviall authored this brief in whole. No person or entity other than Aviall made a monetary contribution to preparation or submission of this brief.

ARGUMENT

Aviall brought suit against Cooper Industries in the United States District Court for the Northern District of Texas, seeking to recover Aviall's costs for a voluntary clean-up of pollution on property Aviall had purchased from Cooper. Aviall alleged that pollution occurred on the property at the time Cooper owned it. Aviall sought to recover from Cooper that company's proportionate share of Aviall's clean-up costs under sections 107(a) and 113(f) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA").

The district court dismissed Aviall's claims for failure to state a claim. The U.S. Court of Appeals for the Fifth Circuit reversed that decision, but this Court reversed the Fifth Circuit and ruled that a section 113(f) did not authorized Aviall's claim because the claim was not a claim for contribution brought during or following a "civil action." *Cooper v. Aviall*, 125 S. Ct. 577 (2004). The case was remanded to the district court for a determination of whether Aviall could state a claim for under section 107(a) of CERCLA.

On remand, the Fifth Circuit ordered that Aviall be permitted to amend its pleadings in the district court to assert all available statutory claims. Thereafter, Aviall amended its complaint to assert, *inter alia*, claims for direct cost recovery and implied contribution under section 107 and federal common law. The district court granted summary judgment in favor of Cooper, holding that Aviall, as a potentially responsible party ("PRP"), was not entitled to bring a

cost-recovery or contribution action under section 107 against Cooper, also a PRP. The district court then declined to exercise supplemental jurisdiction over Aviall's remaining claims under Texas state law and dismissed the action for lack of subject matter jurisdiction. On September 13, 2006, Aviall filed a timely Notice of Appeal to the U.S. Court of Appeals for the Fifth Circuit, where the appeal is pending.

In the district court, Aviall argued that it was entitled to bring a claim against Cooper under section 107 because: (1) this Court has recognized the existence of an independent right of cost recovery under section 107; (2) the language of section 107(a)(4)(B) authorizes such a cause of action; and (3) Congress did not preempt the cause of action provided in the plain language of section 107. *See* Brief in Support of Aviall's Response to Cooper's Motion for Summary Judgment at 7-14, *Aviall Servs., Inc. v. Cooper Indus., Inc.*, No. 3:97-CV-1926 (N.D. Tex. Aug. 8, 2006), *appeal filed* Sept. 13, 2006 (5th Cir. docketed Sept. 18, 2006).

The thrust of Aviall's argument was, first, that this Court, in *Key Tronic Corp. v. United States*, 511 U.S. 809 (1994), recognized the existence of an express or implied cause of action under section 107 for cost recovery or contribution that allowed PRPs to seek cost recovery—even after Congress adopted the express right of contribution in section 113.

Second, Aviall argued that when the language of section 107(a)(4)(B) provides that a PRP has liability for response costs incurred by "any other person," the obvious construction of that phrase is that these other

persons are distinguished from the federal, state, and tribal authorities (each of whom are otherwise defined as a "person" under sections 102 and 107 of CERCLA) who have a cause of action under section 107(a)(4)(A). There is nothing in this plain language to indicate that "any other person" is limited to innocent parties or excludes PRPs.

Third, Aviall argued that in adopting section 113, Congress did not preempt or otherwise eliminate the cause of action under section 107 recognized by this Court and various lower courts. In fact, the express language of the last sentence of section 113(f)(1) states: "Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action . . ." As this Court stated in *Cooper Industries*, the "sole function of the sentence is to clarify that § 113(f)(1) does nothing to 'diminish' any cause(s) of action for contribution that may exist independently of § 113(f)(1)." 125 S. Ct. at 583. According to Aviall, this cause of action for contribution was necessarily implied by section 107 or, alternatively, from federal common law.

In the petition for writ of certiorari in this case, the United States points out that since this Court issued its decision in *Cooper Industries*, three courts of appeals have addressed this question, and at least two other courts of appeals are presently considering it. Petition at 24 n.11. The United States also points out that many district courts have addressed the question—including the district court in Aviall's case—with conflicting results. Petition at 24 n.12.

Aviall's appeal thus brings this question before the Fifth Circuit, which means that this question now is being considered by three courts of appeals. Aviall's appeal thereby confirms the continuing importance of the question presented in the petition for writ of certiorari in the present case.

CONCLUSION

To resolve present conflicts in the lower courts regarding this important question, Aviall Services, Inc., supports the position of the United States asking this Court to grant the petition for writ of certiorari.

Respectfully submitted,

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